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No. 427

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

VIRGINIA PETROLEUM JOBBERS ASSOCIATION, *Petitioner*

v.

FEDERAL POWER COMMISSION, et al., *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Virginia Petroleum Jobbers Association prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-styled cause on June 22, 1961.

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, p. 1a) is not yet reported. The order of the Federal Power Commission (R. 197) affirmed by the Court of Appeals is reported at 23 F.P.C. 245. The order of the Commission denying Petitioner's application for subpoena *duces tecum* (R. 172), the approval of which by the Court of Appeals gives rise to this Petition, is reported at 21 F.P.C. 901.

JURISDICTION

The judgment of the Court of Appeals was entered on June 22, 1961. The jurisdiction of the Court of Appeals was based on Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b). The jurisdiction of this Court is based on Section 1254(1) of the Judicial Code, 28 U.S.C. 1254(1).

QUESTION PRESENTED

In a proceeding on an application under Section 7(a) of the Natural Gas Act, 15 U.S.C. 717f(a), the Federal Power Commission found that a proposed project for the sale and distribution of natural gas would be in the public interest. In so doing the Commission relied almost exclusively upon oral and documentary evidence by a professional engineer concluding that the project would be economically feasible. Petitioner sought a subpoena *duces tecum* to another professional engineer who had, at the instance of the applicant, studied the economic feasibility of a substantially identical project and rendered a written report concluding that it was highly doubtful.

The question presented is whether the Commission properly refused to issue the subpoena on the sole

ground that to do so would compel testimony from an expert about matters that had come to his knowledge in his capacity as an expert at the fees of a lay witness, and that, to quote from its order, Petitioner "should arrange for compensation to be paid him as an expert witness, and for his voluntary attendance at the hearing." (R. 172.)

STATUTES AND RULE INVOLVED

Administrative Procedure Act, Section 6(c), 5 U.S.C. 1005(c):

> "Subpenas.—Agency subpenas authorized by law shall be issued to any party upon request and, as may be required by rules of procedure, upon a statement or showing of general relevance and reasonable scope of the evidence sought. Upon contest the court shall sustain any subpena or similar process or demand to the extent that it is found to be in accordance with law and, in any proceeding for enforcement, shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply."

Natural Gas Act, Section 14(c), 15 U.S.C. 717m:

> "For the purpose of any investigation or any other proceeding under this act, any member of the Commission, or any officer designated by it, is empowered to administer oaths and affirmations, subpena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, contracts, agreements, or other records which the Commission finds relevant or material to the inquiry. Such attendance of witnesses and the production of any such records may be required from any place in

the United States or at any designated place of hearing. Witnesses summoned by the Commission to appear before it shall be paid the same fees and mileage that are paid witnesses in the courts of the United States."

Rules of Practice and Procedure of the Federal Power Commission, Section 1.23; 18 C.F.R. 1.23:

"Subpenas. (a). *Issuance.* Subpenas for the attendance of witnesses or for the production of documentary evidence, unless directed by the Commission upon its own motion, will issue only upon application in writing to the Commission or the presiding officer, except that during sessions of a hearing in a proceeding, such application may be made orally on the record before the Commission or presiding officer, who shall specify as nearly as may be the general relevance, materiality, of the evidence sought and to issue such subpenas in accordance with such determination. Such written applications shall be verified and shall specify as nearly as may be the general relevance, materiality, and scope of the testimony or documentary evidence sought, including, as to documentary evidence, specification as nearly as may be, of the documents desired and the facts to be proved by them in sufficient detail to indicate the materiality and relevance of such documents."

STATEMENT OF THE CASE

The Blue Ridge Gas Company (Blue Ridge) applied to the Federal Power Commission (Commission) for an order under Section 7(a) of the Natural Gas Act, 15 U.S.C. 717f(a), requiring Atlantic Seaboard Corporation, a natural gas pipeline subject to the jurisdiction of the Commission, to establish physical connection with facilities proposed to be constructed by Blue Ridge and to furnish it with a supply of gas for sale

and distribution in Harrisonburg, Virginia and its environs. Petitioner, an non-profit organization of wholesale and retail distributors of petroleum products whose members would compete in the fuel market proposed to be served by Blue Ridge, filed a petition to intervene in the proceeding on Blue Ridge's application. Intervention by Petitioner was denied, a brief hearing was held at which Blue Ridge's application was unopposed, and an order granting it was issued. Upon petitions to review both the order denying Petitioner intervention and the order granting Blue Ridge's application the Court of Appeals for the District of Columbia Circuit reversed both orders and remanded the proceeding to the Commission with directions to permit Petitioner to intervene and to hold hearings *de novo* on the application. *Virginia Petroleum Jobbers Association* v. *F.P.C.*, 105 App. D.C. 172, 265 F. 2d 364.

Thereafter Petitioner participated as an intervenor in the reopened proceedings. To support its contention that its project was economically feasible, and that it was therefore necessary and desirable in the public interest to grant its application, Blue Ridge introduced in evidence and relied upon a report and expert testimony by one Joe E. Ross, a professional engineer in the employ of Ford, Bacon and Davis, a private engineering firm employed by Blue Ridge. Witness Ross' report contained facts, opinions and estimates respecting population, fuel use, cost of the project, number and type of customers, volumes of gas saleable, and expenses and revenues.

During the course of the proceeding Petitioner discovered that Blue Ridge had commissioned Ebasco Services, Incorporated, also a private engineering firm,

to make a study and report on the economic feasibility of a substantially identical project.[1] This study and report were made by one Alan E. Lockwood, a professional engineer in the employ of Ebasco. His report, like that of Witness Ross, contained facts, opinions and estimates respecting population, fuel use, cost of the project, number and type of customers, volumes of gas saleable, and expenses and revenues. Unlike that of Witness Ross, Mr. Lockwood's report concluded that the economic feasibility of the proposed project was highly doubtful.

Petitioner applied to the Examiner of the Commission conducting the hearing for a subpoena *duces tecum* to Mr. Lockwood because the principal contested issue was the economic feasibility of the project and the heart of Blue Ridge's case was Mr. Ross' report and testimony thereon. The Examiner found that the evidence sought to be adduced through Mr. Lockwood was relevant and material, but concluded that, since Mr. Lockwood was an expert, he could not be compelled to appear at a lay witness' fee (R. 167). Instead, he said that Petitioner should arrange for Mr. Lockwood's voluntary appearance at the hearing at an expert's compensation (R. 167). Thereafter, Petitioner filed with the Commission a formal written application for a subpoena *duces tecum* to Mr. Lockwood under Section 1.23(a) of its Rules of Practice and Procedure (R. 163). The Commission denied the application on the same ground as the Examiner (R. 172, 21 F.P.C. 901).

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[1] Ebasco was so commissioned before all of the capital stock in Blue Ridge was sold and the new owners thereof changed its corporate name from Consumers Utility Company to Blue Ridge Gas Company.

The crucial issue before the Commission was the economic feasibility of Blue Ridge's project, and the evidence thereon was in sharp conflict. In resolving this issue the Examiner, and the Commission in adopting his initial decision, relied almost exclusively on the report and testimony of Mr. Ross. As the Examiner stated in his decision "Ford, Bacon & Davis, an engineering firm of the highest standing was employed by [Blue Ridge], to prepare an economics and engineering report respecting the distribution project. According to this report, the project is economically feasible." (R. 178). In accepting Mr. Ross' estimate of gas sales and revenues the Examiner said:

> "The engineer who made the estimates has had broad experience in forecasting sales revenues from distribution projects. He stated that in his opinion the estimates were 'reasonable and possibly conservative'. Finally, the engineering report is that of a firm of excellent reputation. . . ." (R. 180).

In these circumstances the report and testimony of Mr. Lockwood casting doubt on the economic feasibility of the project were relevant and material, as indeed the Examiner and the Commission concluded[2] (R. 167, 172).

The Court of Appeals upheld the action of the Commission denying the subpoena on the general ground that whether evidence sought by subpoena is of reasonable scope is a problem for the Commission, and that

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[2] In denying the subpoena the Commission stated that it was not passing on the relevance or materiality of Mr. Lockwood's evidence. But if it could reasonably have found that it was not relevant or material it would have been sufficient to have denied the application for subpoena on that ground. Cf. *Cia Mexicana de Gas* v. *F.P.C.*, 167 F. 2d 804 (C.A. 5th, 1948).

"it is in a better position than the courts to judge the proper method of compensation for the expert testimony which necessarily comprises a substantial portion of the evidence before it." (App., *infra*, p. 4a).

REASONS FOR GRANTING THE WRIT

An Important Unsettled Question of Federal Law

To the best of our knowledge the question presented is one of first impression in any federal court. It is unquestionably one of vital importance to the orderly and proper discharge of the responsibilities of federal administrative agencies within the framework of the procedural standards established by the Administrative Procedure Act. Until this question is resolved that Act cannot fulfill its function "as a guide to him who seeks fair play and equal rights under law, as well as to those invested with executive authority."[3] Hence we submit that the decision of the Court of Appeals resolves "an important question of federal law which has not been, but should be, settled by this Court." Rule 19, 1(b) of this Court.

Moreover, we submit that the answer to the question given by the Court of Appeals is not only erroneous, but, if allowed to stand as a precedent, will effectively negate the requirement of Section 6(c) of the Administrative Procedure Act that agency subpoenas "be issued to any party in interest upon request and, as may be required by rules of procedure, upon a statement or showing of general relevance and reasonable scope of the evidence sought." In cavalierly leaving the matter of the issuance of administrative subpoenas to the unguided discretion of the administrative agencies the

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[3] These are the words of the late Pat McCarran, Chairman of the Senate Committee on the Judiciary at the time the Administrative Procedure Act became law.

Court below invited a return to the " 'haphazard' and often unfair method of issuance" which it was the purpose of Section 6(c) to stop.[4] It thus plainly abdicated its duty to assure compliance with the Administrative Procedure Act, and in so doing thwarted the Congressional intent specifically stated as follows:

> "Interpretation and Enforcement.—Except in a few respects, this is not a measure conferring administrative powers but is one laying down definitions and stating limitations. These definitions and limitations must, to be sure, be interpreted and applied by agencies affected by them in the first instance. *But the enforcement of the bill, by the independent judicial interpretation and application of its terms, is a function which is clearly conferred upon the courts in the final analysis.*
>
> "*It will thus be the duty of reviewing courts to prevent avoidance of the requirements of the bill by any manner or form of indirection, and to determine the meaning of the words and phrases used.*" (General Comments in Senate Report No. 752, 79th Cong., 1st Sess. Emphasis supplied)

The Weight of the Erroneous Holding of the Court Below

The seriousness of an erroneous holding of the Court of Appeals for the District of Columbia Circuit on a basic issue of federal administrative procedure is plain in the light of that Court's particularly heavy responsibilities in this field. Thus, to illustrate, only that Court has jurisdiction to entertain appeals from the Federal Communications Commission under Section 402(b) of the Federal Communications Act (47 U.S.C. 402(b)). That Court and that Court alone has jurisdiction to review every order of the Federal Power Commission judicially reviewable under either Section 19(b) of the

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[4] Quoted from Explanation of Section 6(c) in the June, 1954 Senate Judiciary Committee Print of the bill, Sen. Doc. 248, 79th Cong. 2nd Sess. p. 27.

Natural Gas Act (15 U.S.C. 717r), or Section 313 of the Federal Power Act (16 U.S.C. 825l), and every order of the Civil Aeronautics Board judicially reviewable under Section 1006 of the Federal Aviation Act (49 U.S.C. 1486). The great weight given that Court's opinions by other federal courts as a consequence of its special place in the administration of law by federal agencies is in itself a "special and important" reason for review by this Court on writ of certiorari. Rule 19, 1 of this Court.

The Violation of the Administrative Procedure Act and the Commission's Rules of Procedure

Section 6(c) of the Administrative Procedure Act makes it abundantly clear that private litigants before federal administrative agencies are to have the same right to obtain subpoenas authorized by law as the agencies themselves have. It provides that such subpoenas "*shall* be issued to any party upon *request* and, as may be required by rules of procedure, upon a statement or showing of general relevance and reasonable scope of the evidence sought." If any gloss on this plain command is needed the legislative history of that Act makes clear that the rights of litigants are not to be dependent on the whim or caprice of the agency. In the Senate Judiciary Committee Report on the bill which became the Act, Section 6(c) is explained as follows:

> "Statutory provisions conferring administrative subpena powers are usually incomplete. They confer powers, but say nothing of the conditions of issuance or *the rights of private parties*. Subsection (c) is designed to: (1) *Assure that private parties as well as agencies shall have a right to such subpoenas. This is an indispensable requisite to fair procedure since if the private party does not have the benefit of compulsory process he may not*

be able to secure witnesses or evidence while the agency can have such process for its own purposes." (Sen. Doc. No. 248, 79th Cong., 2d Sess. p. 27. Emphasis supplied).

There can be no doubt that the subpoena Petitioner requested is "authorized by law" as those words are used in Section 6(*c*). Section 14(*c*) of the Natural Gas Act empowers the Commission, for "the purpose of any investigation or any other proceeding under this act, . . . to . . . subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, contracts, agreements, or other records which [it] finds relevant or material to the inquiry." No claim has been or could be tenably made that the subpoena was unauthorized by law for any of the traditional reasons, e.g., that the territorial limits of the tribunal's process would be exceeded, or that the proper witness fees were not properly tendered, or that the application for subpoena was too broad or failed to describe with particularity the documents sought, or that the evidence sought was privileged for any reason or would be inadmissible under the hearsay or any other exclusionary rule.

It follows that the subpoena requested could be denied only if Petitioner failed to meet the only other condition for its issuance found in Section 6(*c*) of the Administrative Procedure Act, namely failed to make such a "showing of general relevance and reasonable scope of the evidence sought" as the Commission might require "by rules of procedure." What showing do the rules of procedure of the Federal Power Commission require? Section 1.23(a) of its Rules of Practice and Procedure is the governing rule. *Supra*, p. 4. In terms it requires no showing in the case of

oral applications to an examiner. However, the requirement of a showing of relevance and materiality is implicit, for he is authorized "to determine the relevancy (sic) and materiality of the evidence sought and to issue such subpoenas in accordance with such determination." Written applications must "specify as nearly as may be the general relevance, (sic) materiality, and scope of the testimony or documentary evidence sought." Under this Section of its Rules the Commission has never employed any other test for issuance *vel non* of a subpoena than relevance and materiality. See *Re Texas Eastern Transmission Corp.*, 15 F.P.C. 1565; *East Tennessee Nat. Gas Co.*, 23 F.P.C. 629; *Re Gulf Oil Corp., et al.*, 23 F.P.C. 192; *Re Deep South Oil Co. of Texas*, 23 F.P.C. 852.

Petitioner made the showing required by the Commission's Rules of Procedure, for the Examiner found and the Commission did not deny that the evidence sought was relevant and material. Section 6(*c*) of the Administrative Procedure Act therefore plainly required that the application for subpoena be granted. Nothing in that Act gives either the Commission or the Courts any authority to impose any conditions on the issuance of subpoenas other than those imposed by that Section itself, i.e., (a) that the subpoena be authorized by law and (b) that Petitioner's showing comply with the Commission's rules of procedure. Yet the Court of Appeals approved what the Commission conceded in brief to it to be an *ad hoc* addition to the requirements of Section 1.23 of its Rules of Practice and Procedure, made under a claimed right "to fashion its own body of evidentiary law."[5]

In so holding the Court below allowed the Commission to violate its own rules. This was not only error,

[5] Brief for the Commission in the Court below, pp. 8, 9.

but in marked contrast to that same Court's holding just one week earlier in *Public Service Com. State of N.Y. et al. v. F.P.C., et al.*, No. 15366, et al., decided June 15, 1961, petition for rehearing denied August 3, 1961. In that case it reversed an order of the Commission denying Public Service intervention in a proceeding under Section 7(c) of the Natural Gas Act on the ground that the notice of intervention had made the showing therefor required by the Commission's rules. The Commission argued there, as it did here, that in a particular case it was free to impose greater requirements than those contained in its general rules of procedure. The Court's short answer was that while the Commission could change its rules of procedure, it could not leave them in effect and at the same time deny parties their rights thereunder. (Slip Op. on Pet. for Rehearing, p. 4). So here, the Commission has proscribed the showing an applicant for a subpoena must make in the only way Section 6(c) of the Administrative Procedure Act authorizes, i.e., by rules of procedure. As long as those rules are in effect it cannot deny a subpoena to one who makes the showing they require.

The Mis-Application of "Reasonable Scope"

We need not quarrel with the view of the Court of Appeals that whether the evidence sought by the application for subpoena was of "reasonable scope" was primarily a problem for the Commission. Assuming *arguendo* that this proposition is correct, it has no application here. The words "reasonable scope" in Section 6(c) limit the nature of the *evidence* sought. To quote the Senate Committee, the purpose was to:

> "... prevent the issuance of improvident subpenas or action by an agency requiring a detailed, unnecessary, and burdensome showing of evidence which might fall into the hands of the party's

adversaries or investigators and prosecutors (who in any event should not have access to such papers directly or indirectly)." Sen. Doc. No. 248, 79th Cong. 2d Sess., p. 27.

The Commission did not hold here that the evidence sought was unreasonable in scope. Compare *Independent Directory Corp.* v. *F.T.C.*, 188 F. 2d 468 (C.A. 2nd 1951), in which the Court upheld the denial of a subpoena *duces tecum* because of the doubtful relevancy of the documents sought and the sweeping nature of the request.[6] Compare also *E. B. Muller & Co.* v. *F.T.C.*, 142 F. 2d 511, 520 (C.A. 6th 1944), in which the Court upheld the denial of a subpoena *duces tecum* which would have required a competitor of the applicant for subpoena "to give a complete list of his customers and the sources of his operating capital."

In contrast to the holdings in these cases, the Commission and the Court here did not hold that the scope of the evidence sought was unreasonable. They held that, regardless of the scope of the *evidence sought* the *witness sought* could not be compelled to testify because his evidence would be that of an expert, and that Petitioner, in the words of the Commission, "should arrange for compensation to be paid him as an expert witness, and for his voluntary attendance at the hearing." (R. 172).

The Right to Compel Expert Testimony

This is a clearly erroneous holding. There is no requirement that a party to a proceeding make arrange-

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[6] "The subpoenas *duces tecum* which were requested and denied required the New York Telephone Company and the Reuben H. Donnelley Corporation to produce all contracts for listings and advertisements in any of their telephone directories for the years 1940-1948, inclusive, and all copy, proof, correspondence and records of telephone conversations with regard to seventeen of the witnesses and their business concerns." 188 F. 2d at p. 470.

ments for the voluntary appearance of a witness. The time-honored and only judicially recognized method of procuring a witness is by subpoena. Wigmore Evidence (3rd Ed.) Vol. 8 § 2199; *Blair* v. *U. S.*, 250 U.S. 273, 39 S. Ct. 468, 471. In the *Blair* case this Court affirmed findings of contempt for refusal to answer questions before a grand jury. Referring to the statutes authorizing the issuance of subpoenas and providing fees and mileage the Court said:

> "In all of these provisions, as in the general law upon the subject, it is clearly recognized that the giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person within the jurisdiction of the government is bound to perform upon being properly summoned, and for performance of which he is entitled to no further compensation than that which the statutes provide."

It is of course generally true that the duty "the citizen owes to his government . . . to support the administration of justice by attending its courts and giving his testimony whenever he is properly summoned"[7] does not require him to go out and acquire knowledge about the subject on which he is called to testify. This is the vital distinction which must be drawn in determining whether a subpoena may issue to an expert. See Wigmore, *ibid.*, at § 2203. This is the distinction drawn by the Court below in *Bradley* v. *Davidson*, 47 App. D.C. 266, 284, in which it reversed an order denying subpoenas to experts seeking their opinion of the value of property. It emphasized that the subpoena was "not for the purpose of compelling them to go out and make an appraisal of this property,

[7] *Blackmer* v. *U. S.*, 284 U.S. 421, 438.

but to appear on the witness stand and testify as to facts within their knowledge." In support of its holding the *Bradley* case correctly cited the holding of the Supreme Judicial Court of Massachusetts in *Stevens* v. *Worcester*, 196 Mass. 45, 56, 81 N.E. 907, that "a witness qualified as an expert as to a certain subject may be required to express an opinion regarding that subject, if he has one, but cannot be required to perform labor in order to qualify him to do so. In that case, as here, the witness had formed an opinion which he had committed to writing." This is the rule generally applied. Wigmore, *ibid.*, § 2203.

The Consequences of the Rule the Court Below Establishes

The Commission, with the *approval of the Court of* Appeals, chose to apply the rule of a small minority of jurisdictions. Wigmore (*ibid.*, § 2203) cites seven cases applying it, one of which, *Boynton* v. *R. J. Reynolds Tobacco Co.*, 36 F. Supp. 593, was decided by the District Court for the District of Massachusetts, seems to conflict with *Stevens* v. *Worcester*, *supra*, and, in any event, roundly criticizes the minority rule. If, as the great weight of authority holds, experts should and can be compelled to testify in judicial proceedings as to matters about which they have already acquired knowledge and to state opinions already formed, *a fortiori* they should and can be compelled to do so in administrative proceedings.

It is to be remembered that the primary function of administrative agencies, unlike that of the courts, is the making of expert judgments, which must be based in large part on expert opinion. As the Court below said in this very case "expert testimony . . . necessarily comprises a substantial portion of the evidence before

[the Commission]." (App., p. 4a). Hence, if experts who have already formed expert opinions cannot be compelled to testify the right to subpoena granted by Section 6(c) of the Administrative Procedure Act is rendered largely empty. Moreover, it is to be emphasized that if a private party such as Petitioner cannot compel such testimony neither can the Commission itself, for it is clear that private parties have "the same access to subpoenas as that available to the representatives of agencies." Sen. Doc. No. 248, 79th Cong. 2d Sess. p. 206.

It follows that the rule the Court below establishes will foreclose administrative agencies from access to evidence *absolutely necessary to their intelligent* discharge of their regulatory responsibilities. Furthermore, it would permit unscrupulous applicants for licenses to secure them by getting the opinions of several experts, adducing in evidence the ones favorable to them and concealing the ones unfavorable to them.

The Burden of Compliance With Subpoenas

True enough, it may be burdensome on an expert to have to testify at a lay witness' fee. But the performance of public duties is often burdensome, as for example service on a jury at a fee of $7 per day. 28 U.S.C. § 1871. They still must be performed. Thus, in *F.C.C.* v. *Cohn*, 154 F. Supp. 899 (D.C. S.D.N.Y. 1957) the Court enforced subpoenas *duces tecum* to various corporations beyond the regulatory jurisdiction of the Commission notwithstanding that they required "a mass of material, the production of which would place a considerable burden upon the respondents." Whatever the burden on an expert of complying with a subpoena, Section 6(c) of the Administrative Proce-

dure Act does not permit what was done here, namely the promulgation of a flat rule that subpoenas will not issue to experts. Both the Commission in issuing, and the Courts in enforcing, subpoenas have discretion to place appropriate restrictions and conditions on the exercise of their authority. So in the *Muller* case, *supra*, the Federal Trade Commission granted the request for subpoena only in part in order to protect the witness against disclosure of confidential information about his customers which the applicant for subpoena was not entitled to have. In *F.C.C.* v. *Cohn*, *supra*, the Court, pointing out that a proceeding on an administrative subpoena is equitable in character[8] and that it had discretion to condition or modify it,[9] exercised its discretion by directing that the time and spacing of the production of documents be arranged by the Commission so as to lighten the burden on the respondents, and by ordering that certain documents be treated as confidential by the Commission. Both the Commission and the Courts have that same discretion in the case of subpoenas to experts.

In this case, the person sought by the subpoena, who was duly served with Petitioner's application therefor (R. before F.P.C., p. 3372), made no objection to its issuance. Since this fact reasonably raises the inference that he did not think compliance with it would be unduly burdensome, and Petitioner's application met the requirements of Section 6(c) of the Administrative Procedure Act and the Commission's governing rule, there was no basis on which to deny it.

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[8] *Shotkin* v. *Nelson*, 146 F. 2d 402 (C.A. 10th 1944).

[9] *N.L.R.B.* v. *Anchor Rome Mills*, 197 F. 2d 447 (C.A. 5th 1952).

The subpoena should have issued. Appropriate conditions respecting compensation to Mr. Lockwood could thereafter have been imposed, either by the Commission in proceedings on a motion to quash or by a court in proceedings to enforce or both.

CONCLUSION

For the reasons set forth in this Petition, Virginia Petroleum Jobbers Association prays that a writ of *certiorari* issue to the United States Court of Appeals for the District of Columbia Circuit, and that upon review of the record in this cause its judgment be reversed and this cause remanded to it with directions to remand it to the Federal Power Commission with directions to vacate its order granting the application of Blue Ridge Gas Company, to grant Petitioner's application for subpoena, and to convene further hearings for the taking of evidence on the matters set forth in said application and any other relevant matters arising since the close of the hearings, and thereafter to reconsider the whole record and make proper findings and conclusions thereon.

Respectfully,

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September 20, 1961

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15750

VIRGINIA PETROLEUM JOBBERS ASSOCIATION, *Petitioner*

v.

FEDERAL POWER COMMISSION, *Respondent*
BLUE RIDGE GAS COMPANY, *Intervenor*

On Petition for Review of Order
of Federal Power Commission

Decided June 22, 1961

Mr. Bryce Rea, Jr., for petitioner.

Mr. Howard E. Wahrenbrock, Solicitor, Federal Power Commission, with whom *Messrs. John C. Mason*, General Counsel, Federal Power Commission, *Robert L. Russell*, Assistant General Counsel, Federal Power Commission, and *Milton J. Grossman*, Attorney, Federal Power Commission, were on the brief, for respondent. *Messrs. Willard W. Gatchell*, General Counsel, Federal Power Commission, at the time the record was filed, *Edwin J. Reis* and *Peter H. Schiff*, Attorneys, Federal Power Commission, also entered appearances for respondent.

Mr. Donald E. Van Koughnet for intervenor.

Before: WILBUR K. MILLER, *Chief Judge*, and BAZELON and BURGER, *Circuit Judges*.

BURGER, *Circuit Judge*: The Blue Ridge Gas Company, intervenor herein, is a distributor of propane air gas in Harrisonburg, Virginia, and environs. It desires to estab-

lish natural gas service by constructing facilities to connect with an interstate pipeline, Atlantic Seaboard Corporation, a natural gas company certificated under the Natural Gas Act, 15 U.S.C. §§ 717-717w (1958), at a point in Virginia. Having obtained a certificate of convenience and necessity authorizing construction and operation of the project from the State Corporation Commission, Blue Ridge applied to the Federal Power Commission under Section 7(a) of the Natural Gas Act, 15 U.S.C. § 717f(a) (1958), for an order directing Atlantic to sell an appropriate supply of gas to Blue Ridge and to establish physical connection with its facilities. The Virginia Petroleum Jobbers Association, an organization of wholesale and retail petroleum distributors, sought to intervene in the proceeding. When the Commission refused to allow intervention, we reversed and ordered a new hearing at which Jobbers might participate. *Virginia Petroleum Jobbers Ass'n* v. *FPC*, 105 U.S. App. D.C. 172, 265 F. 2d 364 (1959). At the conclusion of the second hearing the examiner recommended that the requested order be granted and the Commission adopted his recommendation. *Blue Ridge Gas Co.*, 23 F.P.C. 245 (1960). The questions presented are:

(1) May the Commission decline to issue a subpoena for expert testimony and for production of reports prepared by an expert witness for private clients?

(2) Is the finding that the grant of the order was in the public interest supported by substantial evidence?

(3) Should the Commission have ordered that the record be reopened to hear evidence of changes in Atlantic's rates?

Although the Commission lacks regulatory jurisdiction over the purely intrastate operation proposed by Blue Ridge, 15 U.S.C. § 717(c) (1958), the application by Blue Ridge for an extension of service from Atlantic placed the feasibility of the project in issue. The Commission

was bound to protect present and potential users of Atlantic's gas supply from the diversion of gas to a project which is not financially feasible, as well as to consider the effect on Atlantic's other rates of the extension of service. See *Minneapolis Gas Co.* v. *FPC*, 108 U.S. App. D.C. 36, 278 F. 2d 870, *cert. denied*, 364 U.S. 891 (1960); *Panhandle Eastern Pipe Line Co.* v. *FPC*, 232 F. 2d 467 (3d Cir.), *cert. denied*, 352 U.S. 891 (1956).

The primary evidence offered by Blue Ridge at the hearing was a study by a professional engineering firm. Petitioner requested that a subpoena *duces tecum* issue to a private engineer for the production of a report on the feasibility of an earlier but similar project which the engineer had made at the behest of the predecessor of Blue Ridge. The examiner held, and the Commission agreed, that the subpoena should not be granted for expert testimony of this nature, in the absence of an agreement by petitioner for appropriate compensation.

Jobbers contends that the Commission should not have considered this factor, because the matter sought was relevant and material and Section 6(c) of the Administrative Procedure Act, 5 U.S.C. § 1005(c) (1958), provides that "agency subpenas . . . shall be issued to any party upon request and . . . upon a statement or showing of general relevance and reasonable scope of the evidence sought."

Whether a subpoena calling for testimony of this nature was of "reasonable scope" is primarily a problem for the Commission. While we have held in a civil case that expert testimony could in some circumstances be compelled by subpoena, *Bradley* v. *Davidson*, 47 App. D.C. 266 (1918), we note that many other courts have taken the contrary view. *E.g.*, *L'Etoile* v. *Director of Pub. Works*, 153 A. 2d 173 (R.I. 1959); *Pennsylvania Co. for Ins. on Lives & Granting Annuities* v. *Philadelphia*, 262 Pa. 439, 105 Atl. 630 (1918). We cannot deny the Commission its choice

between these views on what is essentially a procedural matter, particularly since it is in a better position than the courts to judge the proper method of compensation for the expert testimony which necessarily comprises a substantial portion of the evidence before it. To extend the reach of the *Bradley* case to the administrative process would unduly encroach on matters more appropriate left to the experienced discretion of the agency.

Petitioner also urges that the record does not support the findings that the grant of the application is in the public interest. We find it unnecessary to discuss particular items of evidence whose weight is contested, since we are satisfied that the availability of a sufficient gas supply, the financial feasibility of the project and the need for the service are amply shown in the record.

Finally, petitioner urges that the Commission should have granted its request to reopen the record to show changes in the rate schedules of Atlantic which might affect the feasibility of the project. The situation presented is the classic administrative law problem of the staleness of the record, in this context, because of recurrent rate changes. As the Supreme Court has stated, if the litigants "might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated. . . ." *ICC* v. *Jersey City*, 322 U.S. 503, 514 (1944). This is not a case in which evidence was rejected because of an erroneously narrow view of the scope of inquiry at the hearing. *Cf. Michigan Consol. Gas Co.* v. *FPC*, 108 U.S. App. D.C. 409, 283 F. 2d 204, *cert. denied*, 364 U.S. 913 (1960); *City of Pittsburgh* v. *FPC*, 99 U.S. App. D.C. 113, 237 F. 2d 741 (1956).

Affirmed.

WILBUR K. MILLER, *Chief Judge*, concurring in the result: I agree that the Federal Power Commission properly refused to issue a subpoena duces tecum for an engineering report as to the feasibility of an earlier project similar to that of Blue Ridge. But I think the refusal to issue the subpoena should be sustained, not for the reason given by the Commission and the court, but because the Commission had no jurisdiction to pass on the feasibility of the Blue Ridge project.

The majority's concession that "the Commission lacks regulatory jurisdiction over the purely intrastate operation proposed by Blue Ridge" does not go far enough; for the Commission also lacks judisdiction over the facilities to be used in the operation.[1] It follows, I think, that the economic feasibility of the proposed construction and operation of facilities for the local distribution of gas is a matter to be passed on by the appropriate state agency. It seems to me, therefore, that Section 1(b) of the Natural Gas Act excludes the feasibility of proposed local distribution facilities from the jurisdiction of the Power Commission, and that the subpoena should have been refused on the ground that the engineering report called for by it related to an issue concerning which the Power Commission had no authority.

The majority hold, however, that when Blue Ridge asked the Power Commission to exercise its authority under Section 7(a) of the Natural Gas Act to direct Atlantic to furnish it with gas, it thereby subjected the feasibility of its project to the scrutiny and determination of the Power Commission. In this connection the majority say:

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[1] Section 1(b) of the Natural Gas Act, 52 STAT. 821 (1938), 15 U.S.C. § 717(b), provides that "The provisions of this Act . . . shall not apply . . . to the local distribution of natural gas or to the facilities used for such distribution . . . ."

> "Although the Commission lacks regulatory jurisdiction over the purely intrastate operation proposed by Blue Ridge, 15 U. S. C. § 717(c) (1958), the application by Blue Ridge for an extension of service from Atlantic placed the feasibility of the project in issue. [1] The Commission was bound to protect present and potential users of Atlantic's gas supply from the diversion of gas to a project which is not financially feasible, [2] as well as to consider the effect on Atlantic's other rates of the extension of service. . . ."

For convenient reference, I have numbered the two statements of principle in the last of the quoted sentences. Neither of them supports the proposition set forth in the preceding sentence: "the application by Blue Ridge placed the feasibility of the project in issue." This is demonstrable, I think.

Statement No. 1 in the quoted excerpt from the majority opinion is, of course, true, but it has no application to the present situation. For the Blue Ridge project is not one "which is not financially feasible." The Virginia Commission's certificates of convenience and necessity, to which I shall make further reference, constitute or reflect a finding by that agency, which had undoubted jurisdiction, that the Blue Ridge project is financially feasible.

The question here is not whether the Power Commission "was bound to protect present and potential users of Atlantic's gas supply from the diversion of gas to a project which is not financially feasible." That may be admitted, as I have said. The question is whether Blue Ridge's application for service gave to the Power Commission jurisdiction to pass on the feasibility of its proposed intrastate project, which had already been approved by the state commission having regulatory jurisdiction. If the Power Commission thereby acquired such jurisdic-

tion, it could only be under Section 7(a) of the Natural Gas Act, which is reproduced in the margin.[2]

It will be noted that, under Section 7(a), before the Power Commission may direct a natural gas company to "sell natural gas to, any person . . . legally authorized to engage in . . . local distribution . . .," it must find such action necessary or desirable in the public interest; and must further find that it would not impair the wholesaler's ability to render adequate service to its customers, and would not place an undue burden upon it. Obviously it is in the public interest that gas be furnished to a legally authorized local distributor if it can be done without prejudice to the wholesaler or to customers already attached; so the inquiry is really narrowed to the question whether such prejudice would result.

I suggest that, in addition to making the findings which are statutory prerequisites, the Power Commission must be satisfied, before ordering service, that the applicant

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[2] Section 7(a), 52 STAT. 824 (1938), 15 U.S.C. § 717f(a), is as follows:

> "SEC. 7. (a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided*, That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers."

is a "person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public". When it is so satisfied, and when it has made the statutory findings, the Power Commission may order the connection. Significantly, the statute does not direct that it must find the local project feasible; such provision was purposely omitted from Section 7(a), I think, for the reason that a legally authorized project is one which has been found feasible. It is therefore my view that, having found the applicant legally authorized by state authority, the Power Commission need not make, and indeed is not authorized or required to make, an independent investigation concerning the economic feasibility of the applicant's local project.

In this case the Power Commission knew its applicant was legally authorized to engage in local distribution. There was before it a certified copy of the order of the State Corporation Commission of Virginia, dated May 22, 1958, granting to Blue Ridge Gas Company certificates of public convenience and necessity to construct and operate the gas transmission lines and other facilities proposed by it. The Virginia authorization was admitted in evidence by the Examiner of the Federal Power Commission May 11, 1959, and was filed with his certification October 20, 1959. The issuance of those certificates caused Blue Ridge to be a "person . . . legally authorized to engage in the local distribution of natural or artificial gas to the public" within the meaning of Section 7(a). I think, as I have indicated, the state certificates connoted an affirmative finding that the Blue Ridge project was economically feasible, for I am sure that otherwise the certificates would not have been issued.

I turn to consider statement of principle No. 2, in the excerpt from the majority opinion quoted above: "The Commission was bound . . . to consider the effect on Atlantic's other rates of the extension of service." While this is true as a general proposition, it has nothing to

do with the financial feasibility of the applicant's local project; instead, it goes to the question whether on the whole the connection would be in the public interest.

Even if an adverse effect on Atlantic's other rates were germane to the question whether the Power Commission has jurisdiction to determine the feasibility of the local project, it would have no bearing here because the proposed connection could have no such effect. The Blue Ridge proposal did not make necessary an "extension of service" by Atlantic, if that term is used to mean an extension of facilities, for Blue Ridge is to build a line to connect its system with Atlantic's pipeline. The only investment required of Atlantic is the trifling cost of a physical connection with its line, which will have no impact whatever on Atlantic's rates.

I consider it immaterial that the Power Commission did not rely on lack of jurisdiction of the feasibility question as a reason for refusing to issue a subpoena duces tecum, for it seems to me that the *Chenery* rule[3] does not apply when a jurisdictional question is presented. The mere fact that the Commission exercised jurisdiction does not preclude us from considering the question whether such jurisdiction existed. The question of jurisdiction lies at the threshold of every inquiry by a court or a commission. Without it, no valid action can be taken.

The majority's disposition of the subpoena question is a holding that the Power Commission had jurisdiction, in the circumstances here, to make its own determination of the feasibility of the Blue Ridge project. This is an erroneous holding, with which I am unwilling to agree. Otherwise, I concur in the reasoning of the majority opinion, and I join in the affirmance of the Power Commission's order.

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[3] S. E. C. v. Chenery Corp., 318 U. S. 80 (1943); S. E. C. v. Chenery Corp., 332 U. S. 194 (1947).

RESPONDENT'S BRIEF IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1961

VIRGINIA PETROLEUM JOBBERS ASSOCIATION, *Petitioner*

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

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BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The order of the Federal Power Commission (R. 172)[1] denying petitioner's application for a subpena *duces tecum*, is reported at 21 F.P.C. 901. The opinion of the court of appeals (Pet. 1a-9a), affirming the order, is not yet reported.

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[1] "R." refers to the Joint Appendix containing the portions of the record which were reproduced in the court of appeals.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 1961. The petition for a writ of certiorari was filed on September 20, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Federal Power Commission properly exercised its discretion in refusing petitioner's request to compel an expert witness to testify for a lay witness' compensation, where petitioner had not shown any inability to arrange for the voluntary attendance of the witness and to compensate him as an expert witness.

STATUTES AND RULE INVOLVED

Section 6(c) of the Administrative Procedure Act, 5 U.S.C. 1005(c), provides:

> **Subpenas and production of evidence.**—Agency subpenas authorized by law shall be issued to any party upon request and, as may be required by rules of procedure, upon a statement or showing of general relevance and reasonable scope of the evidence sought. Upon contest the court shall sustain any such subpena or similar process or demand to the extent that it is found to be in accordance with law and, in any proceeding for enforcement, shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.

The Natural Gas Act provides in pertinent part:

Section 14(c), 15 U.S.C. 717m(c):

> For the purpose of any investigation or any other proceeding under this Act, any member of

the Commission, or any officer designated by it, is empowered to administer oaths and affirmations, subpena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, contracts, agreements, or other records which the Commission finds relevant or material to the inquiry. Such attendance of witnesses and the production of any such records may be required from any place in the United States or any designated place of hearing. Witnesses summoned by the Commission to appear before it shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

Section 15(b), 15 U.S.C. 717n(b):

All hearings, investigations, and proceedings under this Act shall be governed by rules of practice and procedure to be adopted by the Commission, and in the conduct thereof the technical rules of evidence need not be applied. No informality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, decision, rule, or regulation issued under the authority of this Act.

Section 1.23 of the Rules of Practice and Procedure of the Federal Power Commission, 18 C.F.R. 1.23, provides:

Subpenas. (a). *Issuance.* Subpenas for the attendance of witnesses or for the production of documentary evidence, unless directed by the Commission upon its own motion, will issue only upon application in writing to the Commission or the presiding officer, except that during sessions of a hearing in a proceeding, such application may be made orally on the record before the Commission or presiding officer, who is hereby given the

authority to determine the relevancy and materiality of the evidence sought and to issue such subpenas in accordance with such determination. Such written applications shall be verified and shall specify as nearly as may be the general relevance, materiality, and scope of the testimony or documentary evidence sought, including, as to documentary evidence, specification as nearly as may be, of the documents desired and the facts to be proved by them in sufficient detail to indicate the materiality and relevance of such documents.

* * * * *

STATEMENT

The Blue Ridge Gas Company, a distributor of propane gas, applied to the Federal Power Commission for an order under Section 7(a) of the Natural Gas Act, 15 U.S.C. 717f(a), directing the Atlantic Seaboard Corporation, a natural gas pipeline, to establish physical connection with Blue Ridge's facilities and to sell Blue Ridge natural gas for resale and distribution in Harrisonburg, Virginia, and its environs. Petitioner, an organization of wholesale and retail petroleum distributors, intervened in opposition to Blue Ridge's application.[2]

At the hearing, Blue Ridge introduced in evidence the study of a professional engineering firm which supported the economic feasibility of the project (R. 8-14, 22, 90-94). During the course of the hearing, petitioner requested that a subpena *duces*

[2] The Commission originally refused to allow the intervention and granted Blue Ridge's application. The Court of Appeals for the District of Columbia Circuit reversed and ordered a hearing *de novo* in which petitioner was permitted to intervene. *Virginia Petroleum Jobbers Association* v. *Federal Power Commission*, 265 F. 2d 364 (C.A.D.C.).

tecum issue to an engineer employed by another professional engineering firm which had made an earlier study and report on the feasibility of an allegedly similar project at the behest of Blue Ridge, when it was under a different ownership (R. 163-166).[3] Petitioner alleged that the earlier study and report had concluded that the project was not economically feasible. The Hearing Examiner ruled "that a subpoena should not issue for the attendance of the said [expert witness] Lockwood at the hearing, when he would thereby be compelled to testify as an expert witness at a lay witness' fee of $4.00 per day. Instead, the intervenor should arrange for compensation to be paid to him as an expert witness, and for his voluntary attendance at the hearing" (R. 167-168). The Commission upheld the Examiner's ruling, expressly not passing on the relevance or materiality of the evidence sought to be adduced (R. 172).[4] The court of appeals affirmed (Pet. 1a-4a) the Commission's ruling denying the subpena, as well as the Commission's order (R. 197-202) granting the application of Blue Ridge.

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[3] The private engineer, a Mr. Lockwood, lived in Connecticut. Petitioner's application for the subpena acknowledged that, if granted, the subpena would have required Mr. Lockwood to travel from Connecticut to Washington, D. C., for at least a two-day period. For compensation, petitioner tendered "a witness fee of $4.00 per day for two days, expenses of $8.00 per day for two days, and mileage of eight cents per mile for the round trip from Norwalk, Connecticut to Washington, D. C." (R. 164). With respect to compensation for an expert witness, see 28 U.S.C. 1821; 28 C.F.R. 21.2.

[4] The record does not show that, subsequent to the denial of the application by the hearing officer, petitioner made any attempt to secure the voluntary appearance of the expert witness, and there was no showing that the witness was not willing to appear voluntarily.

ARGUMENT

Further review by this Court of the narrow question presented here is not warranted. The court below was clearly correct in holding that the Commission properly exercised its discretion in refusing to issue a subpena. No question of general importance is raised by petitioner. Nor is there a conflict in decisions.

1. Neither the Hearing Examiner, the Commission, nor the court of appeals held, as petitioner asserts (Pet. 14, 18), that under no circumstances could subpenas issue to expert witnesses.[5] Rather, the court held (Pet. 3a-4a) that, since the Commission is in a better position to judge the proper method of compensation of expert witnesses, the Commission properly exercised its "experienced discretion" in determining whether to subpena an expert witness in circumstances in which no attempt had been made to obtain the voluntary appearance of the witness.

Certainly no contention can be made that the Commission acted unreasonably in declining to force the expert to testify at the same compensation accorded a lay witness,[6] and, in fact, petitioner does not so contend. Instead, petitioner argues that Section 6(*c*) of the Administrative Procedure Act, 5 U.S.C. 1005(*c*),

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[5] In addition, contrary to petitioner's statement (Pet. 6, 7), neither the Examiner nor the Commission found that the proffered evidence was relevant and material. Rather, they found it unnecessary to reach this question (R. 167, 172) since they determined that a subpena should not issue for other reasons.

[6] The hardship that might be imposed on a witness by compelling his attendance is exemplified by the present case. See footnote 3, *supra*, p. 5. Two hearings were held; the second commenced on May 11, 1959, continued intermittently for a period of 16 hearing days, and concluded on July 17, 1959 (R. 174).

supra, p. 2, must be read as conferring upon a party requesting a subpena an *absolute* right to its issuance, so long as the evidence sought is relevant and material. But if petitioner's position were to be accepted, the Commission would not be able to refuse a subpena even though it plainly appeared that the evidence sought to be adduced would have to be excluded at the hearing because it was, for example, unsubstantiated hearsay or required the breach of a confidential relationship.

Moreover, the excerpt from the Senate Judiciary Committee Report, relied on by petitioner (Pet. 10-11), does not in any way justify petitioner's interpretation of Section 6(*c*) of the Administrative Procedure Act. What the Committee was obviously suggesting was that an agency should not discriminate between private parties and the agency's staff *in granting or denying* subpenas. It was not suggesting that the agency was to be precluded from establishing reasonable restrictions on the use of subpenas.

The requirements of "general relevance and reasonable scope" imposed by Section 6(*c*) are not inconsistent with the Commission's interpretation of Section 6(*c*). In prescribing these requirements, Congress was endeavoring to remedy a specific evil that it had detected in the practice of some administrative agencies. As the Senate Judiciary Committee stated in its report, S. Rep. No. 752, 79th Cong., 1st Sess., p. 20:

> This provision [Section 6(*c*)] will assure private parties the same access to subpenas as that available to the representatives of agencies. It will also prevent the issuance of improvident subpenas or action by an agency requiring a de-

> tailed, unnecessary, and burdensome showing of evidence which might fall into the hands of the party's adversaries or investigators and prosecutors (who in any event should not have access to such papers directly or indirectly).

2. Petitioner also seems to contend (Pet. 16) that, because some courts have held that experts should be compelled to testify in judicial proceedings, *a fortiori* the same rule should have been applied by the Commission here. Conceding, as did the court below, that the rule urged by the petitioner is controlling in a civil action in the District Court for the District of Columbia under *Bradley* v. *Davidson*, 47 App. D.C. 266, (Pet. 3a), nevertheless, many other courts have taken the view espoused by the Commission. *E.g., People ex rel. Kraushaar Bros.* v. *Thorpe*, 296 N.Y. 223, 72 N.E. 2d 165; *L'Etoile* v. *Director of Public Works*, 153 A. 2d 173 (R.I.); *Pennsylvania Co. for Insurances on Lives & Granting Annuities* v. *Philadelphia*, 262 Pa. 439, 105 Atl. 630. These decisions evidence the reasonableness of the Commission's ruling. As the court of appeals stated (Pet. 3a-4a):

> We cannot deny the Commission its choice between these views on what is essentially a procedural matter * * *. To extend the reach of the *Bradley* case to the administrative process would unduly encroach on matters more appropriate[ly] left to the experienced discretion of the agency.

3. Finally, whatever error might have resulted from the Commission's refusal to issue the subpena was at most harmless. Not only was the evidence of

"economic feasibility" on which the Commission granted Blue Ridge's application sufficient, but it was also highly reliable. As the Hearing Examiner found (R. 180):

> The engineer who made the estimates has had broad experience in forecasting sales revenues from distribution projects. He stated that in his opinion the estimates were "reasonable and possibly conservative." Finally, the engineering report is that of a firm of excellent reputation.

Moreover, petitioner's failure to make any attempt to secure Mr. Lockwood's voluntary appearance (see footnote 4, *supra*, p. 5), either before or after its application for the subpena, indicates that petitioner hardly attached much importance to the proposed and allegedly conflicting testimony. Whatever prejudice the petitioner may have suffered as a result of the lack of Mr. Lockwood's testimony is attributable to petitioner's own inaction. Petitioner therefore cannot now be heard to complain.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT BLUE RIDGE GAS COMPANY IN OPPOSITION

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October 20, 1961

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Rules of Practice and Procedure of the Federal Power Commission, Section 1.23, 18 C.F.R. 1.23	4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 427

VIRGINIA PETROLEUM JOBBERS ASSOCIATION, *Petitioner*

v.

FEDERAL POWER COMMISSION, *Respondent*

BLUE RIDGE GAS COMPANY, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT BLUE RIDGE GAS COMPANY IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (Pet. App., pp. 1a-9a) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 22, 1961. The petition for a writ of certiorari was filed on September 20, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1), 62 Stat. 928.

QUESTION PRESENTED

Whether the Federal Power Commission properly exercised its discretion in refusing Petitioner's request to compel a witness to testify as an expert for lay witness compensation where Petitioner made no showing of inability to arrange for the voluntary attendance of the witness and to compensate him as an expert witness.

STATUTES AND RULE INVOLVED

Section 6(c) of the Administrative Procedure Act, 5 U.S.C. 1005(c); Section 14(c) of the Natural Gas Act, 15 U.S.C. 717m(c); Section 15(b) of the Natural Gas Act, 15 U.S.C. 717n(b); and Section 1.23 of the Rules of Practice and Procedure of the Federal Power Commission, 18 C.F.R. 1.23 are set forth in the Brief for the Federal Power Commission in Opposition to the petition (FPC, pp. 2-4).[1]

STATEMENT OF THE CASE

The case is adequately stated in the Brief for the Federal Power Commission in Opposition to the petition (FPC, pp. 4-5).

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[1] "FPC, p. . ." refers to the Brief for the Federal Power Commission in Opposition to the petition for a writ of certiorari.

ARGUMENT

Respondent Blue Ridge Gas Company joins in and adopts the argument of the Solicitor General of the United States in his Brief for the Federal Power Commission in Opposition to the petition (FPC, pp. 6-9). Accordingly, Respondent Blue Ridge Gas Company deems it unnecessary to burden this Court with a restatement of that argument.

Additionally, it is deemed important in the public interest to bring to the attention of this Court an aspect of this case collateral to the merits of the question presented by the petition but bearing directly on the purpose for which Petitioner seeks review in this Court of the judgment of the court below. Petitioner took the cynical position in the proceeding before the Federal Power Commission, which is the basis of the judgment of the court below, that it valued its right to intervene in that proceeding primarily as "one of the legal means" available to it "to get all the business" it wants[2] (R., p. 48).[3]

Plainly, Petitioner's purpose in seeking review in this Court, as was its purpose in the proceeding both before the Federal Power Commission and the court below, is to delay as long as possible finality to the judgment of the court below in order to continue Peti-

[2] In fairness, it should be stated that it was Petitioner's counsel who took this cynical position, not Petitioner itself; but it is submitted that Petitioner is subject to the burden of its counsel's statement of Petitioner's purpose in this litigation. Petitioner's counsel in this Court was also counsel for Petitioner in the court below and in the proceeding before the Federal Power Commission that is the basis of the judgment of the court below.

[3] "R., p. . ." refers to the Joint Appendix filed as the record in the court below.

tioner's present monopoly of the fuel market of Rockingham County, Virginia. It is submitted that this Court may properly take into consideration the purpose of Petitioner's seeking review of the judgment of the court below in evaluating the good faith of Petitioner's arguments addressed to the merits of the judgment of the court below.

CONCLUSION

The decision of the court below is clearly correct, there is no conflict of decisions and there is no important question warranting review by this Court.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

DONALD E. VAN KOUGHNET
Attorney for Respondent
Blue Ridge Gas Company

Of Counsel:

WEAVER & VAN KOUGHNET
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Washington 6, D. C.

October 20, 1961

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 427

VIRGINIA PETROLEUM JOBBERS ASSOCIATION, *Petitioner*

v.

FEDERAL POWER COMMISSION, ET AL., *Respondents*

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To The Honorable, The Chief Justice of the United States and The Associate Justices of the Supreme Court of the United States:

Pursuant to Rule 58 of the Rules of this Court Virginia Petroleum Jobbers Association petitions this Court for a rehearing of its Order of December 11, 1961 denying the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-styled cause on June 22, 1961. *Virginia Petro-*

leum Jobbers Association v. *Federal Power Commission, et al.*, 293 F. 2d 527 (1961).

The ground for this Petition is the Memorandum Opinion of Mr. Justice Black, in which Mr. Justice Douglas joined, dissenting from the Order denying certiorari. It appears from that opinion that this Court misapprehended the issue raised by the Petition for a Writ of Certiorari. Mr. Justice Black phrased the question presented as follows:

> ". . . whether the Federal Power Commission has authority to refuse to summon a witness to testify to relevant facts in a hearing before it on the ground that the party summoning that witness refuses to compensate him as an expert witness over and above the amount authorized to be paid witnesses in courts under 28 U.S.C. Sec. 1821." —— U.S. ————, 30 L.W. 3194.

We respectfully submit that this is not the question. Petitioner at no time refused to compensate the witness whose testimony it sought as an expert. In fact, in its Petition for Certiorari, Petitioner, noting that it might be burdensome on an expert to testify at a lay witness' fee, took the position that both the Commission on a motion to quash the subpoena, and the Court in a proceeding to enforce it, would have authority to impose appropriate conditions respecting compensation (Pet. for Cert. pp. 17-19). And in its Brief in opposition to certiorari the Commission pointed out that Petitioner was not contending "that the Commission acted unreasonably in declining to force the expert to testify at the same compensation accorded a lay witness, . . ." (Br. p. 6).

The Commission's denial of a subpoena was squarely based on its view that one seeking the testimony of an

expert must "arrange for compensation to be paid to him as an expert witness *and for his voluntary attendance at the hearing.*" (R. 172, emphasis supplied). In other words the Commission held that as a matter of policy it would not compel expert testimony. This is clear from the Briefs to, and the opinion of, the Court of Appeals. Petitioner in Brief stated the question presented as follows:

> "Can the Federal Power Commission deny an application for a subpoena on the ground that the witness is an expert and that his evidence, although relevant and material, would be about matters which had come to his knowledge in his capacity as an expert?"

The Commission in Brief made a counterstatement of the question presented as follows:

> "May the Federal Power Commission decline to issue compulsory subpoena for the production of expert opinion testimony?"

In argument in its Brief to the Court of Appeals (pp. 8-10) the Commission defended its order denying a subpoena on the grounds that it was free "to fashion its own body of evidentiary law uniquely suited to its peculiar regulatory problems so long as the rulings are reasonable and they are applied without discrimination", and that the rule it had adopted was reasonable notwithstanding that it was contrary to the majority rule, adopted in the District of Columbia Circuit in *Bradley* v. *Davidson*, 47 App. D.C. 256 (1918). It argued that "the mere fact that the Commission has followed a rule different from the one that prevails in [the District of Columbia] Circuit does not mean that the Commission *practice* is unreasonable." (Em-

phasis supplied). Pointing to cases from Massachusetts and New York that it interpreted as applying the rule it adopted, the Commission said:

> "The fact that two such highly regarded state-court systems . . . are in accord with the Commission *practice* is well-nigh conclusive evidence of its reasonableness." (Emphasis supplied).

The Court of Appeals clearly affirmed the Commission's holding that its practice of refusing to issue subpoenas for expert testimony was reasonable. While it noted that it had held that such testimony could be compelled by subpoena in a civil case, it also noted that other courts had taken the contrary view and concluded that it could not "deny the Commission its choice between these views on what is essentially a procedural matter . . . . To extend the reach of the *Bradley* case to the administrative process would unduly encroach on matters more appropriately left to the experienced discretion of the agency." (Pet. for Cert. App., p. 3a).

From the foregoing it is plain that the question before this Court is not whether the issuance of a subpoena for expert testimony can be conditioned upon an undertaking by the applicant therefor to make appropriate compensation to the witness. Rather it is a broad and fundamental one, namely, whether Section 6(c) of the Administrative Procedure Act permits a federal administrative agency to adopt a general policy which makes relevant and material expert evidence unavailable unless the expert witness possessed of it voluntarily agrees to appear and testify. We submit that the Court of Appeals erroneously answered this question in the affirmative, and that for the rea-

sons set forth in the Petition for Certiorari it is a question that should be squarely considered and answered by this Court.

Respectfully,

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Dated: January 5, 1962

CERTIFICATE OF COUNSEL

I, Bryce Rea, Jr., certify pursuant to Rule 58 of this Court that this Petition for Rehearing is presented in good faith and not for delay and is restricted to the ground set forth herein, namely, that it appears from the opinion dissenting from the order denying certiorari that this Court did not squarely consider the fundamental question presented by the Petition for Certiorari.

BRYCE REA, JR.